Superintendent of Lands and Surveys, Kuching Division v Robert Lee Chang Hock

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(A)-21–01 OF 2016
TENGKU MAIMUN, BADARIAH SAHAMID AND KAMARDIN HASHIM JJCA
1 NOVEMBER 2016

Land Law — Acquisition of land — Compensation — Respondent's land acquired by appellant for flood bypass project — Appellant conducted inquiries and awarded compensation based on market value of land as at date of s 48 declaration — Respondent referred case to High Court — High Court decided date of valuation ought to be date of inquiry and awarded additional sums — Whether award of High Court contrary to ss 60(1)(a) and 66 of the Sarawak Land Code — Whether appellant could raise issue of valuation under s 47 notification — Sarawak Land Code (Cap 81) ss 47, 48, 60(1)(a) & 66

The respondent's land was subjected to a notification under s 47 of the Sarawak Land Code ('the Code') for the purpose of Sungai Sarawak Flood Mitigation Channel. The said notification was dated 16 July 1997 and 12 years later, pursuant to s 48 of the Code, it was declared that part of the respondent's land was needed for Proposed Flood Bypass from Sungai Sarawak to Batang Salak and thus, it was compulsorily acquired. The appellant subsequently conducted inquiries pursuant to s 51 of the Code to determine the quantum of compensation to be awarded to the respondent for the said acquisition. In determining the quantum of compensation, the appellant had used the market value of the said land as at the date of s 48 declaration ie 2 July 2009. Dissatisfied with the award, the respondent referred the matter to the High Court in which it was held that the date of valuation ought to be the date of the inquiries. In view of the decision, the learned judge awarded additional sums to the respondent, hence the present appeal. The appellant submitted that the award of the High Court was contrary to ss 60(1)(a) and 66 of the Code and prayed that the matter be remitted to another High Court for proper valuation to be made in accordance with s 66 of the Code. On the other hand, the respondent submitted that since it was never the appellant's case in the High Court that the valuation of land ought to be based on the date of s 47 notification, the appellant could not now raised the issue of valuation based on s 47 notification. It was further submitted that even if the learned High Court judge erred in using the date of inquiry as the valuation date, it did not drastically affect the end result.

Held, allowing the appeal, setting aside the order of the High Court and

remitting the case to the High Court for retrial before another judge:

(1) Whatever stance taken by the appellant in the High Court could not defeat the statutory requirement as expressly stipulated in s 60(1)(a) of the Code. It was not for the appellant to waive legislative requirement. The learned High Court judge erred in using the date of inquiry as the valuation date to determine the compensation to be paid to the respondent as based on the plain reading of ss 60(1)(a) and 66 of the Code, the valuation date should be s 47 notification. Thus, the additional sums awarded by the learned High Court judge on the basis of the date of inquiry was without legal justification and could not be sustained (see paras 26–27 & 30).

(2) It was the date of s 47 notification and no others that ought to be considered in determining the compensation to be awarded to the respondent. That being the case, it could not be said that the end result would not be drastically affected given that there was a gap of 12 years between s 47 notification and s 48 declaration (see para 31).

(3) In the instant appeal, there was no evidence as to allow the court to decide on the quantum of compensation to be awarded to the respondent. Thus, the court remitted the case to the High Court for the market value of the acquired parcels as at the date of the s 47 notification, to be considered (see para 32).

[Bahasa Malaysia summary

Tanah responden tertakluk kepada satu pemberitahuan di bawah s 47 Kanun Tanah Sarawak ('Kanun tersebut') bagi tujuan Sungai Tebatan Banjir Saluran Sarawak. Pemberitahuan tersebut bertarikh 16 Julai 1997 dan 12 tahun kemudian, menurut s 48 Kanun tersebut, ia diisytiharkan bahawa sebahagian tanah responden sememangnya untuk Cadangan Pintasan Banjir dari Sungai Sarawak ke Batang Salak dan oleh itu, ia wajib diperolehi. Perayu kemudian telah menjalankan siasatan menurut s 51 Kanun tersebut bagi menentukan kuantum pampasan untuk diawardkan kepada responden bagi pemerolehan tersebut. Dalam menentukan kuantum pampasan, perayu telah menggunakan nilai pasaran tanah tersebut sehingga tarikh deklarasi s 48 iaitu 2 Julai 2009. Tidak puas hati dengan award itu, responden telah merujuk perkara itu kepada Mahkamah Tinggi di mana ia diputuskan bahawa tarikh penilai sepatutnya tarikh siasatan itu. Berdasarkan keputusan itu, hakim yang bijaksana telah mengawardkan jumlah tambahan kepada responden, justeru rayuan ini. Perayu telah berhujah bahawa award Mahkamah Tinggi adalah bertentangan dengan ss 60(1)(a) dan 66 Kanun tersebut dan memohon bahawa perkara itu diremitkan kepada Mahkamah Tinggi yang lain untuk penilaian wajar dibuat menurut s 66 Kanun tersebut. Sebaliknya, responden berhujah bahawa oleh kerana ia bukan kes perayu di Mahkamah Tinggi yang mana penilaian tanah itu patut berasaskan tarikh pemberitahuan s 47, perayu kini tidak boleh

menimbulkan isu tentang penilaian berdasarkan pemberitahuan s 47. Ia selanjutnya dihujahkan bahawa meskipun hakim Mahkamah Tinggi yang bijaksana telah terkhilaf kerana menggunakan tarikh siasatan sebagai tarikh penilaian, ia tidak secara drastic memberi kesan pada hasil akhir.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan meremitkan kes kepada Mahkamah Tinggi untuk perbicaraan semula di hadapan hakim lain:

(1) Apa sahaja pendirian yang diambil oleh perayu di Mahkamah Tinggi tidak boleh mengalahkan keperluan statutori seperti yang ditetapkan dengan nyata dalam s 60(1)(a) Kanun tersebut. Ia bukan untuk perayu untuk mengabaikan keperluan perundangan. Hakim Mahkamah Tinggi yang bijaksana terkhilaf dalam menggunakan tarikh siasatan untuk tarikh penilaian untuk menentukan pampasan yang akan dibayar kepada responden sebagaimana berdasarkan bacaan biasa ss 60(1)(a) dan 66 Kanun tersebut, tarikh penilaian hendaklah pemberitahuan s 47. Oleh itu, jumlah tambahan yang diawardkan oleh hakim Mahkamah Tinggi yang bijaksana berdasarkan tarikh siasatan adalah tanpa justifikasi undang-undang dan tidak dapat dikekalkan (lihat perenggan 26–27 & 30).

(2) Ia adalah tarikh pemberitahuan s 47 pemberitahuan dan tidak ada orang lain yang patut dipertimbangkan dalam menentukan pampasan yang akan diberikan kepada responden. Sebab itu, ia tidak boleh dikatakan bahawa keputusan akhir tidak akan secara drastik terjejas memandangkan terdapat jurang 12 tahun antara pemberitahuan s 47 dan pengisytiharan s 48 (lihat perenggan 31).

(3) Dalam rayuan ini, tiada keterangan yang membenarkan mahkamah memutuskan tentang kuantum pampasan diawardkan kepada responden. Oleh itu, mahkamah meremitkan kes itu kepada Mahkamah Tinggi untuk nilai pasaran bidang yang diperoleh sehingga tarikh pemberitahuan s 47, untuk dipertimbangkan (lihat perenggan 32).]

Notes

For cases on compensation, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2301–2355.

Cases referred to

Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783; [2009] 6 CLJ 501, FC (refd)

Hong Leong Finance Bhd v Staghorn Sdn Bhd [2005] 5 MLJ 101; [2005] 2 CLJ 1, FC (refd)

Jais Chee & Ors v Superintendent of Lands & Surveys Kuching Division, Kuching [2014] 3 CLJ 467, CA (refd)

Superintendent of Lands & Surveys Samarahan Division v Surianto Abdul Hamid & Anor [2016] 3 CLJ 591, CA (folld)
Surianto Abdul Hamid v Superintendent of Lands & Surveys & another case [2014] 1 LNS 1219, HC (refd)

Legislation referred to

Land Code (Cap 81) ss 47, 48, 51, 60(1)(a), 66

Appeal from: Land Reference No KCH-15–3/5 of 2014 (High Court, Kuching)

JC Fong (Hisyamudin Roslan and Evy Liana Atang with him) (Legal Officer, State Attorney-General's Chambers) for the appellant.
Colin Lai (Alvin Yong with him) (Lai & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This appeal arose out of the order of the High Court at Kuching in a land reference matter.

BACKGROUND FACTS

[2] The objector in the court below ('the respondent') was the registered owner of Lot 634 Block 6 Matang Land District ('the parent lot').

[3] The parent lot was subjected to a notification under s 47 of the Sarawak Land Code ('the Land Code') where it was notified that the land was likely to be needed for the purpose of Sungai Sarawak flood mitigation channel. The s 47 notification was dated 16 July 1997.

[4] Vide Sarawak Government *Gazette* No 2624 dated 2 July 2009 which was made under s 48 of the Land Code, it was declared that part of the parent Lot was needed for proposed flood bypass from Sungai Sarawak to Batang Salak.

[5] The following parcels of the parent lot were compulsorily acquired for the said public purpose:

(a) the first parcel, measuring 28,210 sqmt (Lot 1875); and

(b) the second parcel, measuring in aggregate 61,183 sqmt (Lots 1874 and 1876).

[6] Pursuant to s 51 of the Land Code, the appellant conducted inquiries for determining, inter alia, the quantum of compensation to be awarded to the

respondent for the compulsory acquisition of the said parcels of the land.

[7] The inquiry for Lot 1875 was conducted on 28 July 2009 where the appellant made the following award for compensation:

(a) for land: RM1,551,550 or RM55 per sqmt; and

(b) for crops: RM5,644.

[8] As for Lots 1874 and 1876, the appellant conducted the inquiry on 22 June 2011 whereby the following awards were made:

(a) for land: RM3,365,065 or RM55 per sqmt; and

(b) for crops: RM9680.

[9] In determining the quantum of compensation, the appellant had used the market value of the said land as at the date of s 48 declaration ie 2 July 2009.

PROCEEDINGS IN THE HIGH COURT

[10] The appellant through the government valuer, Haslinda bt Hamdan ('RW1') gave evidence that in accordance with s 60(1)(a) of the Land Code, the notification under s 47 dated 16 July 1997 was the material date of valuation. However, after taking into consideration the 12 years gap between the imposition of s 47 notice and the declaration under s 48 of the Land Code, and to be fair to the landowner, RW1 took the date of valuation for the said parcels of land based on s 48 declaration.

[11] The position was also stated in her report tendered in the High Court which read:

> 5.3 However, after taking into consideration the *length of time* which is the twelve *(12) years gap* between the imposition of Section 47 and Section 48 of the Land Code, those transacted comparable sales based on the date of Section 47 dated 16th July 1997 were *NOT been gathered and used* to determine the market value of the subject land.
>
> 5.4 Therefore, in order to be fair to the landowner, only those transacted comparable sales on the date of Section 48 of the Land Code vide *G.N. No. 2624* dated *2nd July 2009* has been gathered and quoted as guideline in determining a fair rate of compensation as shown in *Appendix 'A'* and also shown in a plan marked as *Appendix 'B' respectively*.

[12] Using s 48 declaration as the date of her valuation, RW1 opined that RM55 per sqmt was a fair and reasonable compensation.

[13] In addition to using the s 48 declaration as the date of her valuation,

RW1 further opined that an additional amount of RM555,946.80 should be paid to the respondent for the delay. The amount was derived by multiplying the sum awarded for Lots 1874 and 1876 ie RM3,365,065 with interest at the rate of 8%pa.

[14] For the respondent, the valuer ('OW1') valued Lot 1875 at RM95.28 per sqmt. For Lots 1874 and 1876, OW1 valued the market rate at RM109 and RM106 per sqmt, respectively.

[15] The learned High Court judge referred to her previous decision in *Surianto Abdul Hamid v Superintendent of Lands & Surveys & another case* [2014] 1 LNS 1219 where she had followed the decision of this court in *Jais Chee & Ors v Superintendent of Lands & Surveys Kuching Division, Kuching* [2014] 3 CLJ 467 to hold that the date of valuation ought to be the date of the inquiries, namely 28 July 2009 for Lot 1875 and 22 June 2011 for Lots 1874 and 1876.

[16] Using the date of the inquiries as the date of valuation, the learned High Court judge increased the awards of compensation to RM95 per sqmt for Lot 1875 and to RM109 and RM106 per sqmt for Lots 1874 and 1876 respectively. Aggrieved, the appellant appealed to this court.

THE APPEAL

[17] There were two issues for our determination, namely:

(i) what should be the valuation date for purposes of determining the market value of the acquired parcels of land to assess compensation to be awarded to the respondent; and

(ii) consequent upon (i), whether the additional sums awarded by the High Court were legally justified or should be upheld.

[18] Essentially, learned counsel for the appellant submitted that the learned High Court judge erred in deciding that the valuation of the parcels of the respondent's land that had been compulsorily acquired be determined based on the dates of the inquiries under s 51 of the Land Code. Learned counsel contended that the award of the High Court was statutorily wrong as it was in contravention of ss 60(1)(a) and 66 of the Land Code and prayed that the matter be remitted to another High Court judge for proper valuation to be made in accordance with s 66 of the Land Code.

[19] In reply, learned counsel for the respondent objected to the case being remitted to the High Court. He submitted that the appellant should be

estopped from appealing against the order of the High Court because of the position taken by the appellant in the High Court, where the appellant relied on the date of s 48 declaration. The appellant, contended learned counsel, was bound by this date.

[20] Learned counsel for the respondent further contended that even if the learned High Court judge erred in relying on *Jais bin Chee*, the error did not drastically affect the end result of her decision. The reason being, the difference between the dates relied upon by the appellant and the High Court was a mere 26 days in respect of Lot 1875 and two years in respect of Lots 1874 and 1876.

OUR DECISION

[21] The consideration of the appeal centred on ss 60(1)(a) and 66 of the Land Code. Section 60(1)(a) reads:

> *60 Matters to be considered in determining compensation*
>
> (1) In determining the amount of compensation to be awarded for land resumed under this Part, the Court shall take into consideration the following matters and no others:
>
> (a) the market value at the date of the publication of the notification under section 47 or, if no such notification has been published, the market value at the date of the posting of the declaration under section 48.

While s 66 provides:

> *66 Award to be in writing*
>
> Every award made under this Part shall specify the amount awarded under section 60(1)(a), the amount, if any, deducted under paragraph (b), and the amounts, if any, respectively awarded under paragraphs (c), (d), (e) and (f) of the same sub-section, together with the grounds of awarding or deducting the said amounts.

[22] In deciding that the date of valuation ought to be the inquiry date, the learned High Court had relied on her own decision in *Surianto* where she had followed *Jais bin Chee*. The decision of this Court in *Jais bin Chee* however was not followed by a subsequent panel of this court where the decision of the High Court in *Surianto* was reversed (see *Superintendent of Lands & Surveys Samarahan Division v Surianto Abdul Hamid & Anor* [2016] 3 CLJ 591).

[23] In *Surianto*, one of the issues for determination of this court was whether in view of s 60(1)(a) of the Land Code, the court was entitled to use the date of the inquiry conducted under s 51 as the date of valuation of the subject land.

[24] Speaking through Idrus Harun JCA, this court stated at pp 601–602:

[14] Viewed objectively, we need only say on this aspect that the plain words of s 60(1)(a) allows only one interpretation in that the section requires the court, in determining the compensation to be awarded on the subject lands resumed under s 53, to take into consideration the market value as at the date of the publication of the notification under s 47. Such interpretation is clearly supported by the Court of Appeal's decision in the case of *Buan Joong Sdn Bhd v Superintendent of Lands & Surveys (Kuching Division)* [2005] 2 CLJ 910 wherein it was held that the date of valuation of the acquired land ought to be the date of the public notification issued under s 47 and the date of declaration made under s 48 could not be taken as the material date of valuation as the plain words of s 60(1) did not permit such an interpretation. ...

[15] We would like to emphasise that there is, in this regard, no provision in the Land Code which stipulates the date of inquiry to be the valuation date. Section 60(1) which shows clarity of legislative intention is expressed in a very strong mandatory tone as evident by the use of the words 'shall' followed in the same breath with a strict direction 'and no others' which plainly prohibit the court from considering any market value that does not come within the two limbs of s 60(1)(a) or other than the value as it stood at the time the notification was published in s 47. There is not the slightest room for doubt that any other interpretation of s 60(1) will result, not only in a non-compliance with the mandatory requirement of the section but also will give rise to a situation that entails a further violation of s 66. This is because, s 66 as earlier stated requires every award to specify the amount awarded under s 60(1)(a) only indicating that any other amount awarded which is not in accordance with s 60(1)(a) would not be an award that could be specified under s 66.

[25] Learned counsel for the respondent submitted that since it was never the appellant's case in the High Court that the valuation of the subject lands ought to be based on the date of s 47 notification, the appellant cannot now raise the issue of valuation based on s 47 notification.

[26] In our view, whatever stance taken by the appellant in the High Court cannot defeat the statutory requirement as expressly stipulated in s 60(1)(a) of the Land Code. It was not for the appellant to waive legislative requirement (see *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2009] 6 CLJ 501; *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [2005] 5 MLJ 101; [2005] 2 CLJ 1).

[27] Based on the decision of this court in *Surianto*, we therefore agreed with the appellant that the learned High Court judge erred in using the date of inquiry as the valuation date to determine the compensation to be paid to the respondent. As decided in *Surianto*, we similarly held that based on the plain reading of ss 60(1)(a) and 66, the valuation date should be s 47 notification.

[28] To recap, the date of the s 47 notification in the instant appeal was 16 July 1997 whereas the inquiry was held on 28 July 2009 for Lot 1875 and

on 22 June 2011 for Lots 1874 and 1876. There was thus a delay of 12 years and 14 years respectively in making the award for compensation.

[29] The issue of delay was addressed in *Surianto*, as follows at p 606, which we adopt in the instant appeal:

> [29] Accordingly, with respect, while we agree with *Jais Chee* that a delay in making the award of compensation might cause the compensation awarded to be inadequate, following the Federal Court's decision in *Ong Gaik Kee*, we do not think that it is necessary to go so far as to invoke cl 2 of art 13 for the purpose of determining the fair market value of the subject lands and thus adequate compensation to be awarded to the respondents. We are of the opinion that the respondents can still be adequately compensated within the existing legal framework provided for in Part IV of the Land Code, not by altering the valuation date which is mandatorily required to be used under s 60(1)(a), but instead by determining the market value of the subject lands in accordance with the said section and from this base market value, with admissible evidence adduced that injustice and inadequacy of compensation proven, a favourable and upward adjustment is made to increase the compensation in view of the 12 years lapse between the date of the publication of notice under s 47 and the date of the inquiry under s 51. In this manner, the award will be truly reflective of adequate compensation and at the same time in compliance with ss 60(1)(a) and 66 of the Land Code.

[30] Consequent upon our finding on the first issue, we held that the additional sums awarded by the learned High Court judge on the basis of the date of inquiry was without legal justification and cannot be sustained.

[31] We disagreed with learned counsel for the respondent's submission that even if the learned High Court judge erred in using the date of inquiry as the valuation date, it did not drastically affect the end result. The submission was premised on the date of inquiry and the date of s 48 declaration. This premise, in our view, was flawed. As decided by this court in *Surianto*, it was the date of s 47 notification and no others that ought to be considered in determining the compensation to be awarded to the respondent. That being the case, it cannot be said that the end result would not be drastically affected given that there was a gap of 12 years between s 47 notification and s 48 declaration.

[32] It must be highlighted that in *Surianto*, there was evidence on the market value of the subject lands as at the date of the s 47 notification which enabled this court to make an award for compensation and to substitute the order of the High Court. In the instant appeal however, there was no evidence before us to allow us to decide on the quantum of compensation to be awarded to the respondent. The valuation report of the appellant was based on s 48 declaration while the respondent's valuation report was based on the inquiry dates. Both dates were contrary to s 60(1)(a) of the Land Code. In the

circumstances, it was our view that the proper order to make would be to remit the case to the High Court for the market value of the acquired parcels as at the date of the s 47 notification, to be considered.

[33] We therefore allowed the appeal. We set aside the order of the High Court and we remitted the case for retrial before another judge for purposes of determination of the award in accordance with ss 60(1)(a) and 66 of the Land Code. Since the appellant had also proceeded on the wrong basis in law in the High Court by relying on s 48 declaration, we made no order as to costs.

Appeal allowed, order of the High Court set aside and case remitted to the High Court for retrial before another judge.

Reported by Dzulqarnain Ab Fatar